THE CONSTITUTION AND THE CAMPAIGN TRAIL: WHEN POLITICAL ACTION BECOMES STATE ACTION

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ABSTRACT

Constitutional law often splits society into two realms: public and private. A person's constitutional rights and obligations depend on her classification into one of these realms. Almost all constitutional rights are only protected against encroachment by the state, and thus whether an action constitutes private or state action is incredibly significant. However, the body of law that governs this determination—the state action doctrine—is notoriously muddled.

The longstanding assumption is that political candidates and their campaigns are private actors, though the Court has on occasion, such as in the "white primary" cases, held that action by political parties constitutes state action. However, in recent years, the focus of electioneering has shifted away from political parties, and the democratic process has become far more candidate centric. At the same time, actions that might violate the Constitution if they were carried out by a state actor, such as the removal of protestors from campaign rallies and the rescission of press credentials for campaign events, have become widely publicized. In light of these developments, this Note argues that it is time to consider whether a candidate's actions should now be considered state action for purposes of constitutional tort claims. By combining elements from the Supreme Court's many formulations of the state action doctrine and invoking the logic behind the cases in which the Court found state action by political parties, this Note proposes a framework for assessing whether a candidate and her

† Duke University School of Law, J.D. expected 2021; Indiana University, B.S.P.A. 2018. Thank you to Professors Jeff Powell and Sarah Baker for their advice and guidance when this Note was just a mere idea. Thank you as well to my Scholarly Writing classmates and the editors of the *Duke Law Journal* for reading this Note more times than anyone should have to and for providing insightful feedback. This Note is dedicated to my parents, Heather and Kevin, my sister, Carly, and my incredible husband, Vince, for their undying love and encouragement.

campaign's conduct on the campaign trail should be considered state action.

INTRODUCTION

"[T]he hardest thing about any political campaign is how to win without proving that you are unworthy of winning."

Adlai Stevenson I[1]

On March 1, 2016, from behind a podium with the American and Kentucky flags hanging in the background, then-presidential candidate Donald Trump repeatedly shouted, "Get 'em outta here!"[2] After observing signs held by protestors Kashiya Nwanguma, Molly Shah, and Henry Brousseau that depicted the candidate's face on a pig's body, Trump ordered that the three be removed from his campaign rally in Louisville, Kentucky.[3] Members of the audience proceeded to assault the protestors, shoving and punching them until they exited the rally.[4]

Though not always ending in violence, the practice of removing protestors from campaign events is not uncommon. Five months later, at a Trump rally in Portland, Maine, a group of protestors stood silently, pocket copies of the U.S. Constitution held above their heads.[5] Trump again paused his speech as campaign staffers escorted the protestors out of the building.[6] This practice is also not unique to the Trump campaign. On January 2, 2016, in Amherst, Massachusetts, a man in a Trump shirt stood and shouted, "Shame on you, Bernie," at

1. Richard Cavendish, *Adlai Stevenson's Second Run*, HIST. TODAY (Aug. 8, 2006), https://www.historytoday.com/archive/adlai-stevenson%E2%80%99s-second-run [https://perma.cc/AC9S-ZQV2].

2. Lexington Herald Leader, *Donald Trump Ousts Protesters in Louisville*, YOUTUBE (Mar. 1, 2016), https://youtu.be/vwMqf6Y7Md4 [https://web.archive.org/web/20201118001933if_/https://www.youtube.com/watch?v=vwMqf6Y7Md4].

3. Andrea Diaz, *Trump Did Not Incite Violence Against Protesters at a 2016 Campaign Rally, Court Rules*, CNN (Sept. 12, 2018, 6:33 PM), https://www.cnn.com/2018/09/12/politics/trump-wins-dismissal-lawsuit-kentucky-trnd [https://perma.cc/D6BX-6HCG].

4. Nwanguma v. Trump, 903 F.3d 604, 606–07 (6th Cir. 2018).

5. Jeremy Diamond, *Protesters with Pocket Constitutions Removed from Trump Rally*, CNN (Aug. 4, 2016, 5:44 PM), https://www.cnn.com/2016/08/04/politics/donald-trump-protests-constitution [https://perma.cc/B332-PUVE].

6. Will Drabold, *Protestors at Donald Trump Rally Hold Up Pocket Constitutions*, TIME (Aug. 4, 2016, 4:12 PM), https://time.com/4439590/donald-trump-rally-pocket-constitutions [https://perma.cc/9FTG-79HR].

the campaign rally of presidential candidate Bernie Sanders.[7] Sanders supporters proceeded to "boo" the protestor as he was removed by campaign staff in response to Sanders's call, "Here is a Trump supporter."[8]

The silencing of protestors ought to call to mind the First Amendment, which protects the right to speak freely and "attempt to persuade others to change their views," even though "the speaker's message may be offensive to his audience."[9] If this is true, one might ask: Why have the protestors from these incidents not taken to the courts to vindicate their First Amendment rights? Because the state action doctrine, as it is currently understood, stands in the way.[10]

In *Nwanguma v. Trump*,[11] the protestors removed from the Kentucky rally actually did take to the courts, but not with a First Amendment claim, likely presuming that the state action doctrine would foreclose such an argument.[12] Instead, they sued Trump for injuries relating to the assault and battery committed by rally attendees, and they alleged that Trump had incited a riot.[13] Responding to the complaint, Trump's attorneys wrote in defense:

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7. Dan Merica, *Man Wearing Trump T-shirt Protests at Sanders Rally*, CNN (Jan. 2, 2016, 6:20 PM), https://www.cnn.com/2016/01/02/politics/bernie-sanders-donald-trump-protester [https://perma.cc/UY9Z-MLSW].

8. *Id.* Unlike the first example, the Sanders rally did not result in violence against the protestors.

9. Hill v. Colorado, 530 U.S. 703, 716 (2000); *see also* U.S. CONST. amend. I.

10. When removing protestors, political candidates and their campaigns are often assumed to be private parties exercising their First Amendment right to control their message and remove those with opposing views from events. *See* Benjamin Good, *What We Learn When People Are Kicked Out of Campaign Rallies*, MEDIUM (Aug. 15, 2016), https://link.medium.com/f5PqnrhmSab [https://perma.cc/UJE9-6Y5T] ("The First Amendment protects a campaign's ability to control its political message. That's why political candidates generally have the right to kick protesters out of campaign rallies."); Lee Rowland & Rachel Goodman, *Is It Okay To Kick People Out of Campaign Rallies? That Depends.*, ACLU (Mar. 15, 2016, 3:15 PM), https://www.aclu.org/blog/free-speech/it-okay-kick-people-out-campaign-rallies-depends [https://perma.cc/4TDY-HSFJ] ("Campaigns can opt to exclude protesters from campaign rallies. The First Amendment doesn't stop them—in fact, the First Amendment protects the campaign's right to control its message."). This Note, however, would flip this assumption on its head.

11. Nwanguma v. Trump, 273 F. Supp. 3d 719 (W.D. Ky. 2017).

12. Complaint at 2, *id.* (No. 16-CV-247).

13. *Id.* at 14–18. Specifically, the plaintiffs argued that because Trump's statements were "calculated to incite violence," they were not protected by the First Amendment. *Id.* at 15. Although these protestors were able to file a tort claim for their physical and emotional injuries, in other cases involving a political candidate, such as the Sanders example, tort remedies are not available to vindicate the specific infringement of the protestors' First Amendment right.

> Of course, protestors have their own First Amendment right to express dissenting views, but they have no right to do so as part of the campaign rally of the political candidates they oppose. Indeed, forcing the "private organizers" of a political rally to accept everyone "who wish[es] to join in with some expressive demonstration of their own" would "violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[14]

Relying on the assumption that Trump was a private actor throughout his presidential campaign, his attorneys invoked the First Amendment as a shield from the incitement claim. And in addition to shielding Trump in this instance, that assumption also serves to deter other similarly situated protestors from ever attempting to bring a First Amendment claim against the campaign.

Constitutional law often splits society into two realms: public and private.[15] Lawsuits, such as *Nwanguma*, are complicated by this distinction, as a party's constitutional rights and obligations depend on its classification into one of these realms.[16] In the political context, however, the distinction between public and private is not so cut and dried, especially as modern electioneering has shifted from being party centric to increasingly candidate centric.[17] Nonetheless, courts must attempt to adjudicate claims by deciding whether an individual or organization is a state actor responsible for upholding the constitutional rights of others or a private actor entitled to constitutional rights of her own.[18] State action analysis governs this difficult task.[19]

Adding to this difficulty, the state action doctrine is historically inconsistent. If "[t]he public–private distinction . . . defines our legal bedrock, giving shape to legal systems while remaining mostly unseen, . . . [t]he state action doctrine represents the ragged, rocky

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14. Memorandum in Support of Motion to Dismiss at 8, *Nwanguma*, 273 F. Supp. 3d 719 (No. 16-CV-247) (alterations in original) (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995)).

15. John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 570 (2005).

16. *Id.* ("Depending on which domain one is in makes all the difference in how one's constitutional rights are adjudicated.").

17. *See infra* notes 190–91 and accompanying text.

18. *See* Fee, *supra* note 15, at 575 (explaining that the Constitution only "enables and restrains government power").

19. *Id.* at 573.

outcroppings of this bedrock."[20] Over time, the U.S. Supreme Court has created a series of "tests" to guide this determination. From the public-function test to the entwinement approach,[21] state action analysis remains a highly fact-intensive inquiry characterized by narrow holdings and seemingly contradictory outcomes. Considered a case study in "doctrinal confusion,"[22] the state action doctrine continues to be the subject of many suggestions for improvement.[23]

Unlike the work of other scholars in this area,[24] this Note does not attempt a general revision of the state action doctrine. Rather, this Note presents the doctrine as it applies to political actors, specifically political candidates and their campaign organizations.[25] Building off the "white primary" cases—in which the Court deemed political parties to be state actors when they excluded the plaintiffs from voting in the party's primary election based solely on race—this Note discusses how the logic of those cases extends beyond the party to the candidate herself. Specifically, it argues that as the focus of modern politics has changed from parties to individual campaigns, the candidates themselves are an integral "part of the machinery for choosing [elected] officials"[26] and thus can be considered state actors in certain circumstances.[27]

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20. Christian Turner, *State Action Problems*, 65 FLA. L. REV. 281, 286 (2013).

21. *See infra* Part II.C.

22. *See, e.g.*, Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 BYU L. REV. 575 *passim* (2016). Professor Christopher Schmidt defines "doctrinal confusion" as embodying three characteristics: vagueness, complexity, and incoherence. *Id.* at 604.

23. *See generally, e.g.*, Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985) (suggesting the elimination of the state action requirement entirely); Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration, and the Internet: Directing Law To Serve Human Needs*, 52 HARV. C.R.-C.L. L. REV. 145 (2017) (discussing the merits of seven proposed alternative approaches to the state action doctrine); Turner, *supra* note 20 (proposing a new two-step institutional approach to analyzing state action problems).

24. *See, e.g.*, sources cited *supra* note 23.

25. The phrases "political candidate," "political campaign," and "political candidates and their campaigns" are used interchangeably throughout this Note.

26. Terry v. Adams, 345 U.S. 461, 481 (1953) (Clark, J., concurring in the judgment) (quoting Smith v. Allwright, 321 U.S. 649, 664 (1944)).

27. As there is no singular test for state action and these analyses are highly dependent on the facts of the situation, this Note does not argue that political candidates should always be considered state actors in every circumstance. Instead, it identifies several factors, based on the Supreme Court's previous holdings and tests, that courts should consider when determining whether a political candidate's conduct was state action.

This Note proceeds in four parts. Part I explains the mechanics of constitutional tort claims and highlights how these claims require that the deprivation of constitutional rights occur "'under color' of law," which is identical to state action analysis.[28] Part II traces the evolution of the state action doctrine and provides an overview of the Court's various approaches to identifying state action. Part III describes how the Court has applied the state action doctrine to political parties and how it has been more apt to find state action when the private actor has become an "integral part . . . of the elective process."[29] Finally, Part IV proposes several relevant factors courts should consider when applying the state action doctrine to political candidates. Specifically, it argues that the extensive regulation of campaigns, public funding for campaigns, other benefits received by candidates, and the status of a candidate as an incumbent or other state official may weigh in favor of a finding of state action. It also explores some of the possible implications of being classified as a state actor on the campaign trail.

I. VEHICLES FOR CONSTITUTIONAL TORT CLAIMS

Whether political candidates can be classified as state actors is irrelevant without avenues to hold candidates accountable for constitutional torts.[30] This Part discusses the current vehicles available for individuals to bring such claims.

Though the Constitution lays out a multitude of individual rights and limitations on government power, it notably lacks remedies to vindicate violations of most of these provisions.[31] Historically, plaintiffs filed suits that evoked common law principles to redress constitutional violations.[32] This resulted in a legal gap, however, as some constitutional violations were unenforceable because they lacked an

28. Lugar v. Edmondson Oil Co., 457 U.S. 922, 928 (1982) (quoting United States v. Price, 383 U. S. 787, 794 n.7 (1966)).

29. *Terry*, 345 U.S. at 469 (plurality opinion).

30. "Constitutional violations" and "constitutional torts" are used interchangeably throughout this Note.

31. Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 941 (2019) ("The Constitution says almost nothing about remedies for constitutional violations.").

32. *Id.* at 943. Professor Fallon illustrates this practice using the example of *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), in which a plaintiff brought a trespass claim against a defendant who seized the plaintiff's ship. Fallon, *supra* note 31, at 943. The defendant responded that he was acting upon orders from the president. *Little*, 6 U.S. at 178. The Court determined, however, that the orders were unlawful and thus the defendant's compliance with those instructions was no defense. *Id.* at 179. Therefore, the defendant was held liable. *Id.*

adequate common law analog.[33] For example, "the right to equal treatment, the right to vote, [and] the right to procedural due process, have no neat tort analogues."[34] Additionally, other rights, such as reproductive rights or free speech, "are uniquely rights against government action."[35]

To fill this gap, Congress enacted the Civil Rights Act of 1871,[36] which created a private cause of action to address the deprivation of constitutional rights. The law, now codified at 42 U.S.C. § 1983, provides that any person who "under color of [state law]" violates the constitutional rights of another "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."[37] In *Monroe v. Pape*,[38] the Court explained that the "three main aims" of the law were to "override certain kinds of state laws," to "provide[] a remedy where state law was inadequate," and "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."[39] Essentially, the statute's primary effect is to provide access to the federal courts, even when state tort relief is available, as they are "the most appropriate place for redress of federal rights."[40]

Importantly, § 1983 cannot be used to sue states[41] or territories[42] directly,[43] as "Congress has no power under Article I of the Constitution to subject states to private damage actions, in either

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33. *See* Fallon, *supra* note 31, at 945 ("Some constitutional violations always fell beyond the reach of ordinary tort law for the plain reason that not all violations of constitutional norms were tortious.").

34. Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 14 (1980) (footnotes omitted).

35. *Id.*

36. Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2018)).

37. 42 U.S.C. § 1983.

38. Monroe v. Pape, 365 U.S. 167 (1961).

39. *Id.* at 173–74. For context, Congress passed the law as part of a federal effort to address Ku Klux Klan activities in states that had "made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons." *Id.* at 175 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 428 (1871) (statement of Rep. John Beatty)).

40. Whitman, *supra* note 34, at 22–23.

41. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989).

42. Ngiraingas v. Sanchez, 495 U.S. 182, 191–92 (1990).

43. However, municipalities and other local government units are considered "persons" and thus can be sued under § 1983. Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 690 (1978).

federal or state courts, for violating federal statutes."[44] Thus, § 1983 claims must be brought against individual state officers in their personal capacities.[45] The state, however, often ends up indirectly liable through indemnification contracts or monetary reimbursement policies for judgments against state officers.[46]

Additionally, § 1983 only applies to acts committed under color of *state* law; it does not apply to *federal* actors.[47] That said, federal actors can still be held liable for constitutional violations in two ways. First, federal courts may invoke their broad equitable powers to remedy the violation.[48] Second, for some specific constitutional violations, a plaintiff may seek damages by filing a *Bivens*[49] claim against the federal officer.[50] However, the Court has greatly limited the availability of *Bivens* claims in recent years.[51]

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44. Nick Daum, Comment, *Section 1983, Statutes, and Sovereign Immunity*, 112 YALE L.J. 353, 353–54 (2002) (referring to the Court's holdings in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) and *Alden v. Maine*, 527 U.S. 706 (1999)).

45. *See* Hafer v. Melo, 502 U.S. 21, 30–31 (1991). These suits are based on a "legal fiction" where "the state official who acts in violation of the federal Constitution is 'stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.'" Ameritech Corp. v. McCann, 297 F.3d 582, 586 (7th Cir. 2002) (quoting MSA Realty Corp. v. Illinois, 990 F.2d 288, 291 (7th Cir. 1993)).

46. Daum, *supra* note 44, at 355.

47. The exclusion of federal actors was by design. 42 U.S.C. § 1983 (2018) ("Every person who, under color of any . . . [law] of any State or Territory or the District of Columbia . . . .").

48. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

49. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

50. A *Bivens* claim is a judicially created private right of action for damages against federal actors for certain constitutional violations. *See* Hernandez v. Mesa, 140 S. Ct. 735, 741 (2020) (discussing the judicial history of *Bivens* claims); Anya Bernstein, *Congressional Will and the Role of the Executive in* Bivens *Actions: What Is Special About Special Factors?*, 45 IND. L. REV. 719, 719–20 (2012). In *Bivens*, plaintiff Warren Bivens alleged that federal agents conducted an unlawful search of his home, thus violating his Fourth Amendment rights. 403 U.S. at 389–90. In upholding Bivens's right to sue, the Court explained that "[a]n agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." *Id.* at 392. By concluding that Bivens had "state[d] a cause of action under the Fourth Amendment" against the federal officials, *id.* at 397, the Court "effectively held that federal law enables individuals to sue federal officers for constitutional violations." James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 125 (2009).

51. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) ("Given the notable change in the Court's approach to recognizing implied causes of action, however, the Court has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009))).

Invoking the Constitution "as a sword"[52] in a § 1983 or *Bivens* claim requires proof of two basic elements.[53] First, plaintiffs must "show that they have been deprived of a right 'secured by the Constitution and the laws' of the United States."[54] Second, they must show that the defendant "deprived them of this right [while] acting 'under color of [law].'"[55] Applying this test to strictly private parties illustrates its operation. "[M]ost rights secured by the Constitution are protected only against infringement by governments."[56] Even so, a private person may still deprive another of those rights by her actions. Therefore, to subject a private person to liability for a constitutional violation, a plaintiff must show that the person acted "under color of law."[57]

"Under color of law" has come to be understood "as the same thing as the 'state action' required under the Fourteenth Amendment."[58] In *Lugar v. Edmondson Oil Co.*,[59] the Court made this point explicit: "If the challenged conduct of respondents constitutes

52. Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1532 (1972).

53. Though beyond the scope of this Note, the Court's precedents recognize certain immunities that protect state actors against lawsuits; these further complicate constitutional tort claims. Absolute immunity is available to "the President, judges, prosecutors, witnesses, and officials performing 'quasi-judicial' functions, and legislators." Mitchell v. Forsyth, 472 U.S. 511, 520 (1985) (citations omitted). Qualified immunity is available to "government officials performing discretionary functions . . . as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." Anderson v. Creighton, 483 U.S. 635, 638 (1987). A determination of qualified immunity requires a two-part analysis. First, the court must consider whether the alleged facts "[t]aken in the light most favorable to the party asserting the injury . . . show the officer's conduct violated a constitutional right." Scott v. Harris, 550 U.S. 372, 377 (2007) (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)). Second, the Court must determine if "the right was clearly established . . . in light of the specific context of the case." *Id.* (quoting *Saucier*, 533 U.S. at 201). Through this analysis, qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). If this Note's framework were adopted, future scholarship could explore the implications of the immunity doctrines on political candidates and their campaigns.

54. Flagg Brothers v. Brooks, 436 U.S. 149, 155 (1978).

55. *Id.*

56. *Id.* at 156.

57. *Id.*

58. Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982) (quoting United States v. Price, 383 U.S. 787, 794 n.7 (1966)); *see also* Lugar v. Edmondson Oil Co., 457 U.S. 922, 928 (1982) ("Whether they are identical or not, the state-action and the under-color-of-state-law requirements are obviously related."). See *infra* Part II.A. for a discussion of the Fourteenth Amendment in greater detail.

59. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

state action as delimited by our prior decisions, then that conduct was also action under color of state law and will support a suit under § 1983."[60] To summarize, a prerequisite for a successful constitutional tort claim under § 1983 or *Bivens* is that the defendant's challenged action be classified as state action. What constitutes "state action," however, is not as simple an inquiry as it may appear.

II. EVOLUTION OF THE STATE ACTION DOCTRINE

A. "No State shall . . ." and the Origin of State Action

The Fourteenth Amendment provides for equal protection and due process of law,[61] and it secures those rights considered "implicit in the concept of ordered liberty."[62] But even though it may be expansive, the Fourteenth Amendment is limited in at least one important respect—by the language "No State shall."[63] As Justice Joseph Bradley elaborated in the *Civil Rights Cases*,[64] "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."[65]

The state action requirement serves a dual purpose. First, it protects individual freedoms against the abuse of government power,[66] thus allowing private citizens to "structure their private relations as they choose subject only to the constraints of statutory or decisional

60. *Id.* at 935.

61. U.S. CONST. amend. XIV, § 1.

62. Palko v. Connecticut, 302 U.S. 319, 325 (1937). Regardless of whether one subscribes to Justice Hugo Black's theory of total incorporation, *see* Adamson v. California, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting) ("[O]ne of the chief objects that the provisions of the [Fourteenth] Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states."), or sides with the Court's preferred approach of "selective incorporation," *see* Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 979 n.12 (1985) (providing an overview of the case law applying the Bill of Rights to the states), over the years the Court "has in fact ruled that most provisions of the Bill of Rights are *so fundamental* as to be applicable against the states." Richard J. Hunter, Jr. & Hector R. Lozada, *A Nomination of a Supreme Court Justice: The Incorporation Doctrine Revisited*, 35 OKLA. CITY U. L. REV. 365, 378 (2010).

63. U.S. CONST. amend. XIV, § 1.

64. The Civil Rights Cases, 109 U.S. 3 (1883).

65. *Id.* at 11.

66. Julie K. Brown, Note, *Less Is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561, 562–63 (2008).

law."[67] Second, this requirement protects state actors from liability for private "conduct for which they cannot fairly be blamed."[68] In other words, courts cannot hold the state and its agents liable for private conduct that violates the Constitution unless the conduct is "fairly attributable to the State."[69]

The state action requirement, however, presents challenges in application. It inevitably requires drawing a line between private and state action. This is not always an easy task,[70] particularly in the political context. As the next Section details, the Court has struggled with this distinction, creating a variety of approaches without providing one clear answer.

B. The "Precedential Zoo" of State Action

As noted above, the threshold inquiry for almost all constitutional claims is whether the allegedly violative conduct can be "fairly attributable to the State."[71] In *Lugar*, the Court articulated a two-part approach to this question:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible . . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.[72]

It is this second part where most of the difficulty arises and in which the Court has been historically inconsistent.[73] Scholars portray

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67. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991).

68. Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982).

69. *Id.* at 937.

70. With increased privatization, it is harder to "identify where the government domain ends and the private domain begins for purposes of constitutional law." Fee, *supra* note 15, at 572.

71. *Lugar*, 457 U.S. at 937. The lone exception is claims brought under the Thirteenth Amendment, which the Court has held to control conduct by both state and private actors. The Civil Rights Cases, 109 U.S. 3, 23 (1883) ("Under the Thirteenth Amendment, the legislation . . . necessary or proper to eradicate all forms and incidents of slavery, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not . . . ."); George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1367 (2008).

72. *Lugar*, 457 U.S. at 937.

73. *See* John Dorsett Niles, Lauren E. Tribble & Jennifer N. Wimsatt, *Making Sense of State Action*, 51 SANTA CLARA L. REV. 885, 886 (2011) ("Unfortunately, finding a meaningful distinction between 'state action' and 'private action' has proven difficult. The Court has considered the problem more than seventy times." (footnote omitted)).

the state action doctrine as "a mess"[74] and a "precedential zoo."[75] Even the Court itself has acknowledged the difficulties posed by the doctrine and its many, jumbled precedents.[76] This inconsistency may be due to shifts in the ideological makeup of the Court over time or the subject matter of the regulation in question—for example, the Court is more apt to attribute regulations based on race to state action.[77] Or it could be that the Court's various approaches are actually a method of "unstated balancing . . . of whether or not the Constitution *needs* to apply."[78] Whatever the reason, much of the doctrine is unquestionably protean.

Multiple scholars suggest replacing the Court's current multitude of tests with a single, comprehensive approach.[79] These proposals, however, are often criticized as "inherently self-defeating."[80] It is impossible to develop a single approach that is consistent with precedent and also "meaningfully separate[s] state from private behavior," as every private action is influenced by the state to some degree.[81] Rather than considering such alternative approaches, this

74. Turner, *supra* note 20, at 283.

75. Niles et al., *supra* note 73, at 886.

76. *See* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 378 (1995) ("It is fair to say that 'our cases deciding when private action might be deemed that of the state have not been a model of consistency.'" (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting))); Jackson v. Metro. Edison Co., 419 U.S. 345, 349–50 (1974) ("While the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated, the question whether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer.").

77. Martin A. Schwartz & Erwin Chemerinsky, *Dialogue on State Action*, 16 TOURO L. REV. 775, 780–81 (2000) (statement of Prof. Chemerinsky) (explaining, for example, that the Warren Court was more likely than its successors to find state action).

78. *Id.* at 807 (emphasis added); *see also* Fee, *supra* note 15, at 576 ("Scholars have faulted the contemporary state action doctrine for its failure to guide concrete cases in a meaningful way, for its tendency to hide the underlying policy issues that courts must balance, and for its harmful effects on the politically powerless." (footnotes omitted)).

79. *See, e.g.*, Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329, 334 (1993) (proposing an approach to the public–private distinction by "marking out for constitutional regulation the affirmative use of the state's lawmaking power"); Hala Ayoub, Comment, *The State Action Doctrine in State and Federal Courts*, 11 FLA. ST. U. L. REV. 893, 918–20 (1984) ("[T]he Court should establish a state action theory that is equally applicable to all circumstances"); *see also* Minow, *supra* note 23, at 160–64 (describing seven proposed alternatives to the current state action doctrine).

80. Niles et al., *supra* note 73, at 889.

81. *Id.*; *see also* Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 90 (1967) ("The

Section instead surveys the Court's various formulations of state action analysis in order to later borrow elements of each to develop a new framework for political candidates.

The Court's roving jurisprudence can be distilled into eight formulations of the same question: What can be fairly attributed to the state?[82] Depending on the circumstances of the case, the Court appears to cherry-pick which approach it will apply, and parties regularly advocate for a finding of state action under more than one approach through argument in the alternative.[83] Although not always referred to by any particular name, the Court's opinions on state action may be synthesized to reflect the following approaches: (1) the state-employment test, (2) the state-instrumentality test, (3) the public-function test, (4) the *Burton*[84] interdependence or symbiosis test, (5) the sufficiently close nexus test, (6) the compulsion or coercion test, (7) the joint-participation test, and (8) the *Brentwood*[85] entwinement test.[86]

1. *State Employment and State Instrumentality*. The simplest tests to understand and apply are the state-employment and the state-instrumentality tests. First, the employment test dictates that a government employee is a state actor while acting in his official capacity, so long as his "professional and ethical obligations [do not] require him to act in a role independent of and in opposition to the

commitment of the Court to a single and exclusive theory of state action, or to just five such theories, with nicely marked limits for each, would be altogether unprincipled, in terms of the most vital principle of all—the reality principle.").

82. Many of these formulations have shared elements, but the Author has chosen to describe them as eight distinct approaches to demonstrate both the doctrine's evolution and the Court's inconsistency with regard to describing and analyzing state action questions. Admittedly, the lines between some of the approaches can be a bit blurry and the differences may seem semantic. However, this Note's ultimate goal is to create a new approach for analyzing state action in the context of political campaigns. As such, this comprehensive overview is useful both to show the wide variety of methodologies that a court may use to identify state action and to demonstrate that the idea of creating a novel approach for state action analysis for one specific context is not so absurd given the Court's willingness to adapt its approach to fit the case before it.

83. *See, e.g.*, Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1933 (2019) (addressing the plaintiff-respondent's two alternative arguments for recognizing state action).

84. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

85. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001).

86. These eight tests reflect the Author's own synthesis of the Court's opinions. They are not presented in any chronological fashion nor in terms of the Court's seeming preference for them. However, the following subsections do try to indicate whether an approach has been used more or less frequently over time.

State."[87] For example, a physician contracted by the state to provide medical services to inmates is a state actor while performing this function.[88] However, a public defender is not a state actor when performing traditional legal duties for a criminal defendant.[89] Second, the instrumentality test signifies that government instrumentalities, including agencies, are considered state actors. For instance, in *Lebron v. National Railroad Passenger Corp.*,[90] the Court found state action when Amtrak refused to place the plaintiff's advertisement in Penn Station, in an alleged violation of his First Amendment rights.[91] Because Amtrak was a corporation created by the federal government to further governmental objectives and the majority of its directors were permanently appointed by the government, it was considered an instrumentality of the state for the purpose of determining its constitutional obligations.[92] With these as a starting point, one can venture into the less axiomatic state action formulations, starting with the public-function test.

2. *Public Function*. The public-function test can be traced back to *Marsh v. Alabama*,[93] where the Court held that it was unconstitutional to enforce a state trespassing statute against a Jehovah's Witness who was distributing religious literature on the sidewalks of a privately owned company town.[94] The Court explained that the more a private property owner opens that property for public use, "the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[95] Because the town's citizens had "an identical interest in the functioning of the community," regardless of whether the ownership was public or private, "the channels of communication [had to] remain free."[96]

87. West v. Atkins, 487 U.S. 42, 49–50 (1988).

88. *See id.* at 56 ("Whether a physician is on the state payroll or is paid by contract, the dispositive issue concerns the relationship among the State, the physician, and the prisoner . . . . It is the physician's function while working for the State . . . that determines whether he is acting under color of state law.").

89. Polk Cnty. v. Dodson, 454 U.S. 312, 325 (1981).

90. Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374 (1995).

91. *Id.* at 377, 400.

92. *Id.* at 377, 394, 400.

93. Marsh v. Alabama, 326 U.S. 501 (1946).

94. *Id.* at 503, 509.

95. *Id.* at 506.

96. *Id.* at 507.

From this decision came the broader principle that a private party becomes a state actor, for purposes of constitutional claims, when that party serves a public function.[97] But this doctrine does not mean that any "private entity [which] performs a function which serves the public" is a state actor.[98] Rather, an act is a public function if it is one that has been *traditionally and exclusively* performed by the state.[99] For example, ruling on peremptory challenges in jury selection[100] and conducting elections[101] are traditionally exclusive public functions and are thus transformed into state action even if carried out by private actors.[102] In contrast, the settlement of disputes between debtors and creditors, even in the court system,[103] and the "operation of public access channels on a cable system"[104] are not considered traditional, exclusive public functions.

Applied in only limited settings, such as those previously mentioned, the public-function test does not mean that "all businesses 'affected with the public interest' are state actors in all their actions."[105] However, other approaches, such as the interdependence or symbiosis test, do tend to sweep private conduct into the realm of state action more broadly.

3. Burton *Interdependence or Symbiosis*. The interdependence or symbiosis approach, which emphasizes a more holistic review of the

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97. *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972) ("In effect, the owner of the company town [in *Marsh*] was performing the full spectrum of municipal powers and stood in the shoes of the State.").

98. Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

99. *See* Flagg Brothers v. Brooks, 436 U.S. 149, 158 (1978) ("While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'").

100. Georgia v. McCollum, 505 U.S. 42, 50, 55 (1992) (holding that a criminal defendant who used peremptory challenges to exclude jurors based on race was a state actor); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 624, 627 (1991) (holding that a private litigant in a civil case who used peremptory challenges to exclude jurors solely based on race was a state actor).

101. *See Flagg Brothers*, 436 U.S. at 158 (noting that conducting elections for public office "is an exclusively public function," a "clear" principle drawn from *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); and *Nixon v. Condon*, 286 U.S. 73 (1932)).

102. *See, e.g.*, *McCollum*, 505 U.S. at 54 ("[W]hen 'a government confers on a private body the power to choose the government's employees or officials, the private body will be bound by the constitutional mandate of race neutrality.'" (quoting *Edmonson*, 500 U.S. at 625)).

103. *Flagg Brothers*, 436 U.S. at 161. *But see id.* at 162 n.12 ("This is not to say that dispute resolution between creditors and debtors involves a category of human affairs that is never subject to constitutional constraints.").

104. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019).

105. Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974).

facts and circumstances surrounding the action, can be traced back to *Burton v. Wilmington Parking Authority*.[106] In *Burton*, the Court held that a privately owned restaurant located within a parking building owned and operated by a Delaware state agency was a state actor when it refused to serve the plaintiff because of his race.[107] Though the Court's rather narrow holding was confined to the specific facts that the private actor was a lessee of public property,[108] the Court's reasoning demonstrates a much broader approach.

The Court made clear that determining "a precise formula for recognition of state responsibility . . . is an 'impossible task,'" and "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[109] In *Burton*, the activities and obligations of the private lessee, the responsibilities of the public lessor, the mutual benefits of the relationship, and the location of the private restaurant in a government building together indicated the restaurant's discriminatory practice was indeed state action.[110] The Court has referred to this type of analysis as a test of interdependence[111] or symbiosis,[112] but regardless of the terminology, one realization emerges: this type of inquiry is highly fact specific.

The Court has not relied on the *Burton* test with the same frequency as other state action formulations.[113] Justice Sandra Day O'Connor strongly criticized it as one that "sweeps much too broadly and would subject to constitutional challenge the most pedestrian of everyday activities."[114] However, the Court's emphasis on a holistic

106. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

107. *Id.* at 716–17, 719.

108. *See id.* at 725–26 ("Specifically defining the limits of our inquiry, what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee . . . .").

109. *Id.* at 722 (quoting Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947)).

110. *Id.* at 724.

111. *See id.* at 725 ("The State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity.").

112. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972) ("Here there is nothing approaching the symbiotic relationship between lessor and lessee that was present in *Burton*.").

113. *See* Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 57–58 (1999) (characterizing *Burton* as merely a vaguer version of the joint-participation test established in *Blum v. Yaretsky*, 457 U.S. 991 (1982) and *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974)).

114. Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 411 (1995) (O'Connor, J., dissenting).

review of the facts has carried through into other, similar approaches, including the nexus test.

4. *Sufficiently Close Nexus*. Along the same lines as *Burton*, the nexus test is also highly fact specific.[115] In this formulation, however, the Court asks "whether there is a sufficiently close nexus between the State and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the State itself."[116] In conducting this analysis, no single factor is dispositive, rather many factors must be considered in the aggregate.[117]

Several are particularly relevant.[118] First, a court might consider how heavily regulated a private entity is when assessing state action, though the existence of regulation without other factors is unlikely to result in the finding of a nexus.[119] Second, whether a private party has a government-protected monopoly may also indicate state action, though the challenged action and the party's monopoly status must be sufficiently connected.[120] Third, a court might consider whether the private entity receives some kind of benefit or assistance from the state.[121] And fourth, the receipt of public funding may denote state

115. *See Jackson*, 419 U.S. at 351 ("The true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met.").

116. *Id.* at 350–51.

117. *See id.* (discussing several factors that may contribute to finding a nexus); *id.* at 360 (Douglas, J., dissenting) ("[T]he dispositive question in any state-action case is not whether any single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels a finding of state responsibility.").

118. What follows is a list of factors mentioned by the Court; however, this list is not exhaustive.

119. *See Jackson*, 419 U.S. at 350–51 ("[A]cts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be 'state' acts.").

120. *See id.* at 351–52 (referring to *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952), in which the Court disclaimed reliance on the challenged private entity's status as a "congressionally established monopoly" in its state action analysis).

121. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621 (1991). State benefits are still not dispositive. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972) ("The Court has never held, of course, that . . . [there is state action] if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever."). Also, note that "benefit" is a more encompassing term than "funding," and may include such things as statutory protections or other services provided by the state. *See, e.g.*, *id.* (referencing "state-furnished services" such as "electricity, water, and police and fire protection").

action, though even total dependence on this funding does not automatically convert private action into state action.[122]

In cases before the Supreme Court, the nexus test has not often produced a finding of state action, even after consideration of these factors.[123] Although this approach remains good law and is frequently cited,[124] what exactly constitutes a sufficiently close nexus is unclear.

5. *Compulsion or Coercion*. Unlike the *Burton* and nexus formulations, the Court has been much more direct when it comes to finding state action based on compulsion by the state. As articulated in *Adickes v. S.H. Kress*,[125] "a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act."[126] For example, it is state action where a private restaurant refuses to serve people based on race because a city ordinance requires segregated eating facilities.[127] That said, there is a distinction between compulsion

122. *See* Rendell-Baker v. Kohn, 457 U.S. 830, 840, 843 (1982) (finding no state action when a private school discharged an employee without due process even though it depended on the state for virtually all of its funding).

123. *See, e.g.*, *Jackson*, 419 U.S. at 347, 358 (holding it was not state action for a utility company, though extensively regulated and possessing a state-protected monopoly, to terminate a woman's service without notice, a hearing, and an opportunity to pay her debts); *Moose Lodge No. 107*, 407 U.S. at 171–72, 177 (deciding it was not state action for a private club to refuse service to a customer based on race, even though the club was only permitted to sell alcoholic beverages because the state liquor board had issued the club a license); *Rendell-Baker*, 457 U.S. at 837, 840, 843 (ruling it was not state action for a private school, primarily funded with public funds, to discharge a school counselor without due process for exercising her First Amendment rights).

124. *See, e.g.*, Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 52 (1999) ("Thus, the private insurers in this case will not be held to constitutional standards unless 'there is a sufficiently close nexus between the State and the challenged action of the regulated entity . . . .'"); Rawson v. Recovery Innovations, Inc., 975 F.3d 742, 748 (9th Cir. 2020) (describing the "close nexus" test); Preston v. New York, 223 F. Supp. 2d 452, 464–65 (S.D.N.Y. 2002) (describing the "sufficiently close nexus" and "symbiotic relationships" tests); Eaton v. Univ. of Del., C.A. No. 00-709, 2001 U.S. Dist. LEXIS 10762, at *10–13 (D. Del. July 31, 2001) (concluding that a university's action was state action under both the nexus and symbiosis tests because the state had explicitly conferred powers to the university to appoint law enforcement officers, provided it with benefits (such as land grants and tax advantages), was involved in setting curriculum requirements, and the governor sat on the university's board of trustees).

125. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

126. *Id.* at 170.

127. *Id.*

and permission,[128] and only the former results in an automatic finding of state action.[129]

Beyond explicit compulsion, the Court has also found state action where the state has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[130] In the same way that state permission is not considered compulsion, state inaction is not "authorization" or "encouragement" by the state, at least for the sake of the coercion test.[131]

6. *Joint Participation*. Despite its seeming reluctance to find state action where there is mere acquiescence or permission under the coercion or compulsion test, the Court has found state action where the private party engaged in "joint participation" with the state.[132] A private party acts "'under color' of law" when "he is a willful participant in joint activity with the State or its agents."[133] For example, in *Lugar*, the Court found state action where the defendant, through an ex parte, prejudgment petition, acted jointly with the state to attach the plaintiff's property without due process.[134] The Court later clarified, in *Tulsa Professional Collection Services, Inc. v. Pope*,[135] that "[p]rivate use of state-sanctioned private remedies or procedures does not rise to the level of state action . . . . But when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found."[136] Judicial enforcement of private agreements alone, however, does not typically constitute state action.[137]

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128. *See* Flagg Brothers v. Brooks, 436 U.S. 149, 165 (1978) ("[T]he State of New York is in no way responsible for Flagg Brothers' decision, a decision which the State in § 7-210 permits but does not compel . . . ."). This distinction is probably most clearly exemplified by a statute reading "an individual must" versus "an individual may." Additionally, the Court has rejected arguments by plaintiffs that the completion of state-mandated forms and paperwork indicates state action. *Sullivan*, 526 U.S. at 55.

129. *See Flagg Brothers*, 436 U.S. at 164 ("This Court, however, has never held that a State's mere acquiescence in a private action converts that action into that of the State.").

130. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

131. *Sullivan*, 526 U.S. at 54.

132. Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (1982).

133. United States v. Price, 383 U.S. 787, 794 (1966).

134. *Lugar*, 457 U.S. at 941–42.

135. Tulsa Pro. Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988).

136. *Id.* at 485–86.

137. Fee, *supra* note 15, at 582. One exception is presented in *Shelley v. Kraemer*, in which the Court found state action when private actors relied on court enforcement of private agreements

C. A Twenty-First Century Development: Brentwood *Entwinement*

Over the years, the conservative wing of the Court has evinced a preference for a "'rule-oriented' approach" to state action that favors more concrete tests, such as the public-function or coercion tests, yet the liberal wing tends to prefer a more "totality of the circumstances" approach.[138] As the "precedential zoo" developed through the twentieth century, the conservative view appeared to dominate.[139] But at the turn of the twenty-first century, the Court provided a new formulation of the same type of fact-intensive inquiry used in the *Burton* and nexus cases.[140]

In *Brentwood Academy v. Tennessee Secondary School Athletic Association*, the Court considered whether the enforcement of a rule against a member school by a statewide association responsible for regulating interscholastic athletic competition among public and private high schools could be considered state action.[141] Citing the nexus test, the Court explained that "what is fairly attributable [to the state] is a matter of normative judgment, . . . [and] no one fact can function as a necessary condition across the board for finding state action."[142] Even so, that normative judgment should be based on a finding that "[t]he nominally private character of the [entity] is overborne by the *pervasive entwinement* of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards."[143]

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that included race-based restrictive covenants. *Id.* at 581–82 (citing Shelley v. Kraemer, 334 U.S. 1 (1948)). The *Shelley* Court explained that the state "ha[d] made available . . . the full coercive power of government to deny" the plaintiffs equal protection of the law, and that "the action of state courts and of judicial officers in their official capacities" is always regarded as state action. 334 U.S. at 14, 19. However, this case is considered an anomaly and has not since been relied upon. Fee, *supra* note 15, at 582.

138. Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1391 (2006).

139. *Id.* at 1382, 1391–92.

140. *Id.*; *see also supra* Part II.B.3. While both are fact-intensive, *Brentwood* takes a slightly more formulaic approach to the holistic review endorsed by *Burton*, focusing on both top-down and bottom-up entwinement of the state and the private entity. *See infra* notes 141–47 and accompanying text.

141. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 290 (2001).

142. *Id.* at 295.

143. *Id.* at 298 (emphasis added).

Without providing an exact definition of "pervasive entwinement," the Court suggested that it exists when the relevant facts indicate a "largely overlapping identity" between the state and the private entity.[144] Here, 84 percent of the association's membership consisted of public schools, and each member school had a representative who voted for the association's governing bodies.[145] In addition to this bottom-up entwinement, there was top-down entwinement in that members of the Tennessee State Board of Education served on the association's governing bodies, and association employees received the same state retirement benefits as state employees.[146] On these facts, the Court held that the association had engaged in state action.[147]

Even though it found state action, the Court acknowledged that facts indicating entwinement "may be outweighed in the name of some value at odds with finding public accountability in the circumstances."[148] However, the Court was fairly vague in explaining what would constitute a "substantial reason to claim unfairness."[149] It rejected the association's argument that its classification as a state actor would result in "an epidemic of unprecedented federal litigation" and that "the social utility of expanding [the] class [of possible defendant actors]" weighed against this classification.[150]

Justice Clarence Thomas dissented in *Brentwood*, fearing the majority's unprecedented holding "not only extend[ed] state-action doctrine beyond its permissible limits but also encroache[d] upon the realm of individual freedom that the doctrine was meant to protect."[151] That said, Justice Thomas may not yet have much to fear, as the entwinement test has been applied—though inconsistently—rather

144. *Id.* at 303 (emphasizing that "entwinement"—like "'[c]oercion' and 'encouragement'"—is another way of "referring to kinds of facts that can justify characterizing an ostensibly private action as public instead").

145. *Id.* at 299–300.

146. *Id.* at 300.

147. *Id.* at 302.

148. *Id.* at 303.

149. *Id.* at 298.

150. *Id.* at 304–05.

151. *Id.* at 305 (Thomas, J., dissenting); *see also id.* at 314–15 ("Because the majority never defines 'entwinement,' the scope of its holding is unclear . . . . I am not prepared to say that any private organization that permits public entities and public officials to participate acts as the State in anything or everything it does . . . .").

narrowly in the circuit courts.[152] Further, in a 2019 opinion, Justice Brett Kavanaugh, writing for the Court, did not even mention entwinement in his examples of the "few limited circumstances" in which a private entity qualifies as a state actor.[153] Nonetheless, entwinement is now a part of the state action doctrine and opens up the possibility that new, more fact-intensive approaches to state action analysis—such as the framework this Note proposes in the campaign context—may be permissible.

III. THE CLASSIFICATION OF POLITICAL PARTIES AS STATE ACTORS

Again, plaintiffs can vindicate constitutional violations committed by private parties if the private action is found to actually constitute state action—an analysis for which the Court has developed several approaches over the years. This Part examines how the doctrine has been applied to find state action on the part of seemingly private political parties.

A. Political Parties and the White Primary Cases

Political parties[154] walk the line between private and public.[155] Though "not formally one of the national political institutions," parties

152. *See, e.g.*, P.R.B.A. Corp. v. HMS Host Toll Roads, Inc., 808 F.3d 221, 222 (3d Cir. 2015) (deciding there was no entwinement between the state and a private operator of highway service plazas because there was no personnel overlap or specific involvement of the state in the challenged activity—the decision to remove brochures for a "gentleman's club" from the plaza common areas); Grogan v. Blooming Grove Volunteer Ambulance Corps., 768 F.3d 259, 269 (2d Cir. 2014) (holding there was no entwinement between the state and a private nonprofit contracted by the state to provide emergency medical and ambulance services because the nonprofit did not receive the majority of its funding from the town, and the town did not have any say in the nonprofit's management or personnel decisions); Johnson v. Rodrigues, 293 F.3d 1196, 1205 (10th Cir. 2002) (comparing the entwinement test to the symbiosis test and citing the dictionary definition of "entwine"—"to twine together, to interweave, attach or involve inextricably in sentiment or thought"—in arriving at its conclusion).

153. *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019) (listing "(i) when the private entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the private entity" (citations omitted)).

154. This Note defines "political party" as "an association, committee, or organization which nominates [or selects] a candidate for election to . . . office whose name appears on [an] election ballot as the candidate of [the] association, committee, or organization." 52 U.S.C. § 30101(16) (2018).

155. *See* Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 777 (2000) ("The crux of the problem political parties pose for lawyers and judges derives from parties' uncertain

play an essential role in the maintenance of American democracy.[156] The white primary cases—which predate many of the cases described above—assessed whether the actions of political parties could be considered state action.[157]

In the first of the three white primary cases, *Nixon v. Condon*,[158] the Texas Democratic Party, through its State Executive Committee, adopted a resolution that only white Democrats could vote in the primary.[159] The Committee was empowered by statute to adopt resolutions determining primary voter qualifications, but it did not have the inherent power to do so.[160] Because the Committee's authority derived entirely from the state, the Court held that the party had "become to that extent [an] organ[] of the State itself, [a] repositor[y] of official power."[161] By granting the political party this authority—which the Court recognized as especially significant, as it caused the party to then become the means by which government itself is established and continued—the state had discharged its functions so as to discriminate on the basis of race. Thus, the Court determined that the party's action was state action.[162]

The Court again relied upon the role of the primary as an "integral part of the election machinery"[163] to find state action in *Smith v. Allwright*.[164] There, the Texas Democratic Party independently adopted a resolution at its State Convention limiting party membership

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constitutional and legal status . . . . A substantial amount of the caselaw in this area rests on whether judges switch on the state actor toggle.").

156. *See* Robert C. Wigton, *American Political Parties Under the First Amendment*, 7 J.L. & POL'Y 411, 413–14 (1999) ("[P]olitical parties . . . have long provided what may be considered quasi-governmental services, including candidate recruitment, the operation of political campaigns, and the supervision of the voting process.").

157. Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 58 (2001). The following cases do not specifically refer to one or more of the tests described in *supra* Part II by name. Even so, elements of each test are present in the Court's analysis, including elements of the public-function, instrumentality, compulsion, and joint-participation approaches.

158. Nixon v. Condon, 286 U.S. 73 (1932).

159. *Id.* at 82.

160. *Id.* at 88.

161. *Id.*

162. *Id.* at 88–89.

163. United States v. Classic, 313 U.S. 299, 318–20 (1941).

164. Smith v. Allwright, 321 U.S. 649 (1944).

to white individuals.[165] Unlike *Condon*, there was no state statute or other grant of power influencing the party's decision regarding its membership.[166] The party claimed it was permitted to adopt such a resolution because as a "voluntary organization," it was "free to select its own membership."[167] The Court rejected this argument, however, holding instead that because the party was required to abide by a statutory system in order for its nominees to appear on the general election ballot, the party was "an agency of the state" for the determination of primary election participation.[168] "When primaries become a part of the machinery for choosing officials," the state, in adopting a general election ballot of party nominees, "endorses, adopts and enforces the discrimination . . . practiced by [the] party."[169] Therefore, the party's action was considered state action.[170]

In 1953, the Court took its reasoning in *Smith* a step further. In *Terry v. Adams*,[171] the Jaybird Democratic Association, a voluntary political organization, excluded Black individuals from participating in its primaries.[172] The winners of the Jaybird primary nearly always entered the subsequent Democratic primary and won the nomination.[173] In his plurality opinion, Justice Hugo Black found that the Jaybird primary had become an "integral part . . . of the elective process," even though neither the state nor the party controlled any aspect of the Jaybird elections.[174] Because the Democratic primary and general election had become "no more than the perfunctory ratifiers of the choice that ha[d] already been made in [the] Jaybird election[]," it was immaterial that the state did not directly control the Jaybird primary process.[175] Because "the effect of the whole procedure, Jaybird primary plus Democratic primary plus general election" resulted in the

165. *Id.* at 656–57. The right to vote in the Democratic primary was conditioned on party membership. *Id.*

166. Klarman, *supra* note 157, at 59.

167. *Smith*, 321 U.S. at 657.

168. *Id.* at 663 ("The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party.").

169. *Id.* at 664.

170. *Id.*

171. Terry v. Adams, 345 U.S. 461 (1953).

172. *Id.* at 462–63 (plurality opinion).

173. *Id.* at 463.

174. *Id.* at 469.

175. *Id.*

deprivation of Black individuals' rights to vote, the Jaybird Association was held to be a state actor.[176] In his concurring opinion, Justice Tom Clark explained this principle even more broadly:

> Any "part of the machinery for choosing officials" becomes subject to the Constitution's restraints . . . . [W]hen a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play.[177]

The white primary cases were the first instances of the Court finding state action due to its recognition of the essential role that political parties play in the democratic process. This reasoning has since been even further expanded.

B. Modern Treatment of Political Parties

Beyond the white primary cases, the Court has treated political parties as state actors in other circumstances as well.[178] For example, in *Gray v. Sanders*,[179] the Court determined that the Georgia Democratic primary's use of the "county unit system"[180] violated the "one person, one vote" principle.[181] Because the state "adopts the primary as a part of the public election machinery[,] . . . state regulation of this preliminary phase of the election process makes it state action."[182]

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176. *See id.* at 469–70 (holding that by depriving Black individuals of the right to vote, the Texas Democratic Party violated the Fifteenth Amendment).

177. *Id.* at 481, 484 (Clark, J., concurring in the judgment) (quoting Smith v. Allwright, 321 U.S. 649, 664 (1944)).

178. Similar to the white primary cases, these cases do not refer to a particular state action test by name. *See supra* note 157 and accompanying text. However, the Court's reasoning seems to borrow elements from the public-function, interdependence or symbiosis, nexus, and joint-participation approaches.

179. Gray v. Sanders, 372 U.S. 368 (1963).

180. Under this system, each county had a specific number of representatives in the state legislature. *Id.* at 370–71. Candidates for primary nominations who won the popular vote in each county were entitled "to two votes for each representative to which the county is entitled." *Id.* at 371. "[T]he majority of the county unit vote nominated a United States Senator and Governor; the plurality of the county unit vote nominated the others." *Id.* According to the plaintiff, this worked out so that one unit vote in a county comprising of 14.11 percent of Georgia's total population represented 92,721 residents, whereas one unit vote in a county comprising 0.05 percent of the state's total population represented 938 residents. *Id.*

181. *Id.* at 381.

182. *Id.* at 374–75.

Following a similar line of reasoning, in *Morse v. Republican Party of Virginia*,[183] the Court held that the Virginia Republican Party was acting under the authority of the state[184] when it required a party registration fee to participate in the primary.[185] Justice John Paul Stevens, in his plurality opinion, explained that because the state has sole authority to set qualifications for ballot access and reserves two places on its ballot for the major parties, the parties are effectively "delegated the power to determine part of the field of candidates from which the voters must choose."[186] By accepting the party's selection, the state "'endorses, adopts and enforces' the delegate qualifications set by the Party for the right to choose that nominee."[187]

Like in *Gray*, the *Morse* Court explained that it is "'recognition of the place of the primary in the electoral scheme,' rather than the degree of state control over it," that indicates state action when the party is granted authority to determine primary-voter qualifications.[188] These cases make clear that political parties are especially susceptible to crossing the line between private and state action due to the fundamental role they play in the maintenance of American democracy.[189] This realization, however, raises the questions: How far can this reasoning reach? Could it ever extend past the party to the candidate herself?

IV. POLITICAL CANDIDATES AND CAMPAIGNS AS STATE ACTORS

Over time, the political campaign has shifted from smaller operations—which focused mostly on retail politics with a larger

183. Morse v. Republican Party of Va., 517 U.S. 186 (1996).

184. Specifically, the Court considered whether the Republican Party of Virginia was subject to the same preclearance requirement of § 5 of the Voting Rights Act as the state of Virginia. *Id.* at 190 (plurality opinion). Justice John Paul Stevens explained that the "operative test" for determining whether the political party is subject to § 5 is "whether [the] political party exercises power over the electoral process." *Id.* at 218.

185. *See id.* at 190, 199–200 ("In concluding that the regulation applies to the Party, we are guided by the reasoning of *Smith v. Allwright*, [321 U.S. 649 (1944)] . . . .").

186. *Id.* at 197–98 (quoting *Smith*, 321 U.S. at 664).

187. *Id.*

188. *Id.* at 199 (quoting *Smith*, 321 U.S. at 660).

189. The Court has stated it will not interject itself into the *inner* workings of the political party organization. *See* O'Brien v. Brown, 409 U.S. 1, 4 (1972) (per curiam) ("[No] court has . . . interject[ed] itself into the deliberative processes of a national political convention . . . . [T]he convention itself is the proper forum for determining intra-party disputes . . . .").

emphasis on the political party—to what scholars call the "new-style" of electioneering.[190] Now, "[t]he candidate, rather than the party, . . . tends to be the chief focus of . . . campaign communication."[191] However, political parties today are not totally irrelevant. To the contrary, they have transformed "into 'service-oriented' organizations" that provide candidates with financial and human capital, as well as "serve as 'brokers,' linking 'candidates and interest groups, the individual contributors, the political consultants, and the powerful incumbents who possess some of the money, political contacts, and campaign experience that candidates need.'"[192] That said, as elections become more candidate centric, and thus campaigns become an even more integral part of the elective process,[193] it would logically follow that the actions of political candidates and their campaign organizations should be assessed more closely for possible state action.

A. A New Framework for Assessing Political Candidates and Campaigns for State Action

Because there is no single state action test and the approaches detailed above are particularly fact intensive,[194] it would be impossible to argue that political candidates are categorically state actors for the purposes of constitutional tort claims. However, based on the Court's precedents, courts should consider several factors when determining the threshold question of whether a political candidate and her campaign can be considered a state actor.[195] Abiding by state action precedent, no one factor is dispositive, nor will each factor be relevant to every approach outlined in Part II. However, as constitutional torts and the campaign trail collide, the following considerations weigh in favor of holding political candidates and their campaigns to be state

190. MICHAEL BURTON, WILLIAM J. MILLER & DANIEL M. SHEA, CAMPAIGN CRAFT: THE STRATEGIES, TACTICS, AND ART OF POLITICAL CAMPAIGN MANAGEMENT xv–xvi (5th ed. 2015).

191. *Id.* at xviii (quoting ROBERT AGRANOFF, THE NEW STYLE IN ELECTION CAMPAIGNS 4 (1972)).

192. *Id.* (quoting PAUL S. HERRNSON, CONGRESSIONAL ELECTIONS 111 (6th ed. 2012)).

193. *See supra* notes 171–77 and accompanying text (describing *Terry v. Adams*, 345 U.S. 461 (1953)).

194. *See supra* Part II.B–C.

195. Although many of the examples in the following analysis refer to federal elections, the framework here is not limited to federal elections. The factors outlined may very well play a role in elections at the state and local levels and should be considered by courts accordingly.

actors, under either a current or new test designed to assess state action in the context of modern election realities.

First, as incorporated from the nexus test,[196] courts should recognize that political campaigns and elections are extensively regulated.[197] To start, the state determines who is permitted to run for which office,[198] as *Smith* emphasized.[199] Then, the state establishes the process for a candidate to run—this includes certain paperwork requirements, filing fees, disclosure requirements, and so on.[200] Campaign finance is also the subject of detailed regulation. For instance, the Federal Election Campaign Act[201] sets limits on political contributions, requires candidates to report from where their money is raised and how it is spent, and provides for oversight and enforcement by the Federal Election Commission.[202] Granted, many industries are extensively regulated, and the Court has emphasized that mere regulation alone does not indicate state action.[203] However, given the critical importance of election regulations to preserving the democratic

196. *See supra* Part II.B.4 (describing the nexus test).

197. *See supra* note 119 and accompanying text (explaining that courts may consider the extensive regulation of a challenged activity, though mere regulation is not alone enough to find state action). For a summary of election laws, see *Voting and Election Laws*, USA.GOV (Sept. 1, 2020), https://www.usa.gov/voting-laws [https://perma.cc/B8D7-P77X].

198. *See, e.g.*, U.S. CONST. art. II, § 1, cl. 5 (requiring that an individual running for president be at least thirty-five years of age, a natural-born U.S. citizen, and a resident of the United States for fourteen years); *Who Can Become a Candidate for State Legislator*, NAT'L CONF. STATE LEGISLATURES (Apr. 22, 2015), http://www.ncsl.org/research/elections-and-campaigns/who-can-become-a-candidate-for-state-legislator.aspx [https://perma.cc/H5PU-STN7] (listing each state's eligibility requirements for state legislators).

199. *See supra* notes 168–68 and accompanying text.

200. *See, e.g.*, *Filing Fees for Candidates for State Legislator*, NAT'L CONF. STATE LEGISLATURES (Mar. 16, 2020) http://www.ncsl.org/research/elections-and-campaigns/filing-fees-for-candidates-for-state-legislators.aspx [https://perma.cc/48CR-HZZR] (listing the filing fees for state-legislature candidates in the thirty-three states that require major party candidates to pay such fees); *Paperwork Requirements for Filing as a Candidate for State Legislator*, NAT'L CONF. STATE LEGISLATURES (June 3, 2015), http://www.ncsl.org/research/elections-and-campaigns/paperwork-requirements-for-filing-as-a-candidate-for-state-legislator.aspx [https://perma.cc/5XT6-PMTT] (listing each state's paperwork requirements for state-legislature candidates).

201. Federal Election Campaign Act of 1971, 52 U.S.C. § 30101 (2018).

202. *See Contribution Limits*, FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits [https://perma.cc/HS5U-G7XR] (listing, for example, contribution limits for individual donors to candidate committees and PACs for the 2019–20 federal-election cycle).

203. This point was reemphasized as recently as 2019 in *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1932 (2019).

institutions that the Constitution was designed to protect, perhaps a slight divergence from precedent is appropriate. That is, in the political context, the nature of the state's heavy involvement in election regulation should be considered a more relevant factor in the state action analysis than perhaps regulation of an industry less vital to democracy, such as utilities.[204]

Second, and relatedly, courts should consider the involvement of public funding in political campaigns. Doing so would be consistent with both the nexus and *Burton* approaches. To address concerns that elections could be bought by private interest groups, public-election funding programs began in the 1970s with the Presidential Public Funding Program ("PPFP").[205] Through PPFP, candidates for president seeking nomination in a political party's primary are eligible for primary matching funds from the federal government,[206] and major party nominees in the general election are eligible to receive $20 million plus a cost of living adjustment—in 2020, this would have been $103.7 million—in exchange for foregoing all private contributions.[207] These programs are funded through the Presidential Election Campaign Fund, which is raised through the three-dollar check-off on the 1040 federal income tax form.[208]

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204. *Cf.* Jackson v. Metro. Edison Co., 419 U.S. 345, 358 (1974) (stating that the extensive regulation of an electric company did not alone transform its action into state action).

205. *See generally* MICHAEL G. MILLER, SUBSIDIZING DEMOCRACY (2013) (discussing public-election funding in the United States).

206. To receive this funding, the candidate must raise more than five thousand dollars in each of at least twenty states and receive contributions from a minimum of twenty separate donors in each state. *Public Funding of Presidential Elections*, FED. ELECTION COMM'N, https://www.fec.gov/introduction-campaign-finance/understanding-ways-support-federal-candidates/presidential-elections/public-funding-presidential-elections [https://perma.cc/FA8S-YQ23]. Additionally, the candidate must limit campaign spending for all primary elections combined to $10 million plus a cost-of-living adjustment—in 2020, this national spending limit amounted to $51.85 million—and campaign spending in each state must be limited to a specific amount based on the number of potential voters in a state. *Id.*; *Presidential Spending Limits for 2020*, FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/understanding-public-funding-presidential-elections/presidential-spending-limits-2020 [https://perma.cc/TP44-799L].

207. *Id.* Some partial public funding is available for minor- and new-party candidates who meet certain vote-share requirements. *Id.* Notably, no major party nominee in the presidential election has accepted public funding since John McCain did so in 2008. *See id.* (noting that 2008 was "the last year a major party candidate chose to accept a general election grant"); *FEC Certifies Funds for McCain General Election Campaign*, FED. ELECTION COMM'N (Sept. 8, 2008), https://www.fec.gov/updates/fec-certifies-funds-for-mccain-general-election-campaign [https://perma.cc/8MDG-DTY2] (announcing that the FEC had "approved payment of $84.1 million in federal funds for the general election campaign of John McCain and Sarah Palin").

208. *Public Funding of Presidential Elections*, *supra* note 206.

Since PPFP's creation, fourteen states have also provided some form of public financing option for state campaigns, either in the form of "clean election" bills—which provide full funding for the campaign—or matching funds, which offer partial funding up to a specific amount.[209] Scholars find that these public funding programs can impact election outcomes, and some argue that they decrease the electoral incumbency advantage by approximately 50 percent.[210] Even if the decrease in incumbency advantage is not so marked, it is clear that public funding does increase competitiveness in elections by encouraging new candidates to enter the race.[211] Public funding's potential to impact the outcome of an election makes the acceptance of such funding weigh in favor of a finding of state action, though the exact weight may vary depending on the amount of public funding accepted compared to a candidate's total fundraising.

Third, courts should take into account, in addition to public funding, whether a political candidate has received other benefits throughout her campaign that would suggest a closer relationship between the candidate and the state, similar to the Court's analysis in *Burton*.[212] For example, major party nominees generally have an easier time accessing the ballot compared to unaffiliated candidates,[213] as *Terry* acknowledged.[214] Additionally, at the federal level, the U.S. Secret Service provides protection to "[m]ajor Presidential and Vice

209. *Public Financing of Campaigns: Overview*, NAT'L CONF. STATE LEGISLATURES (Feb. 8, 2019), http://www.ncsl.org/research/elections-and-campaigns/public-financing-of-campaigns-overview.aspx [https://perma.cc/U4KZ-CLJ6].

210. Andrew B. Hall, How the Public Funding of Elections Increases Candidate Polarization 14 (Jan. 13, 2014) (unpublished manuscript), https://www.ifs.org/wp-content/uploads/2014/07/Hall-2014-Tax-Financing-And-Polarization.pdf [https://perma.cc/B9EN-9X4P].

211. Neil Malhotra, *The Impact of Public Financing on Electoral Competition: Evidence from Arizona and Maine*, 8 STATE POL. & POL'Y Q. 263, 277 (2008) ("[T]he empirical evidence on public financing suggests that these programs do not simply fill the coffers of unserious and low-quality candidates, but rather they help serious contestants mount effective challenges.").

212. *See supra* note 110 and accompanying text.

213. *See generally Summary: State Laws Regarding Presidential Ballot Access for the General Election*, NAT'L ASS'N SEC'YS STATE (Jan. 2020), https://www.nass.org/sites/default/files/surveys/2020-07/research-ballot-access-president-Jan200.pdf [https://perma.cc/MS72-WSES] (providing an overview of state legislation regarding presidential-ballot access for party-affiliated and independent candidates).

214. *See supra* notes 172–74 and accompanying text.

Presidential candidates," as determined by the secretary of Homeland Security.[215]

The final factor courts should consider is a candidate's status as an incumbent or challenger. Political science literature has identified a clear incumbency advantage in U.S. elections.[216] For instance, incumbents receive free publicity and frequent constituent interaction while in office.[217] Thus, even though incumbents are campaigning for reelection in their *personal capacity*, the fact that they *are* a state actor in their *official capacity* makes them more likely to defeat any non-"official state actor" challengers. Placing some weight on a candidate's status as an incumbent when analyzing their conduct for state action would help to address the current illogical distinction between incumbents acting in their official versus private capacity.[218]

Additionally, from a *Brentwood* entwinement perspective,[219] an incumbent candidate's campaign is more likely to have a "largely overlapping identity" with the state.[220] After all, the candidate herself is a government official, and it is likely that other government officials will also be involved in the incumbent's reelection efforts.[221] Granted, some of the government officials would be acting in their personal capacities due to limitations on the political activity of government

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215. 18 U.S.C. § 3056(a)(7) (2018); *see also Frequently Asked Questions: 2020 Presidential Campaign*, U.S. SECRET SERV., https://www.secretservice.gov/about/faqs [https://perma.cc/WDD2-FY56] (explaining in further detail how the Secret Service selects presidential and vice-presidential candidates for protection).

216. *See generally, e.g.*, Stephen Ansolabehere & James M. Snyder, Jr., *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942–2000*, 1 ELECTION L.J. 315 (2002) (providing a comprehensive overview of the incumbency advantage in state and federal elections).

217. Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 569 (1999).

218. Admittedly, a valid counterargument to this suggestion is that placing weight on a candidate's incumbency status may unfairly subject incumbent candidates to more claims than challengers. While this is a possibility, this framework specifically does not designate exactly how much weight to apply to each factor, including incumbency status. Therefore, courts applying this framework will need to grapple with this question of fairness when deciding how heavily to weigh a candidate's incumbency status against them.

219. *See supra* Part II.C.

220. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 303 (2001).

221. For example, in 2011, President Barack Obama authorized several senior West Wing officials to communicate directly with his 2012 reelection campaign's Chicago office and the Democratic National Committee. Glenn Thrush & Josh Gerstein, *Campaigning from the White House*, POLITICO (July 22, 2011, 4:32 AM), https://www.politico.com/story/2011/07/campaigning-from-the-white-house-059631 [https://perma.cc/Y4QF-JAA5].

employees put in place by legislation such as the Hatch Act.[222] However, the line between an incumbent acting in her official capacity as a state actor and an incumbent acting in her personal capacity as a political candidate and potential state actor is blurry at best.[223] For instance, President Trump's 2020 reelection campaign faced accusations of Hatch Act violations when the president "deliver[ed] his acceptance speech to the Republican National Convention from the South Lawn of the White House" after receiving the party's nomination as its candidate for the 2020 presidential election.[224] This separation of personal and official realms may work for lower-level employees who have the benefit of anonymity among the general public. But this separation is far less effective when the state official is one the public recognizes in both her personal *and* official capacities and who seeks to benefit from that publicity as a candidate. One cannot so easily separate the state from the incumbent, whether the incumbent is running for reelection or campaigning on behalf of someone else.[225]

To summarize, all of these factors—regulation, financing, other special benefits, and incumbency status—support a conclusion that political candidates and their campaigns are state actors in certain circumstances. Hearkening back to Justice Clark's concurrence in *Terry*, political candidates are an essential "part of the machinery for choosing officials," as they themselves are the choices among which the

222. Hatch Act, 5 U.S.C. §§ 7321–7326 (2018). Notably, the Hatch Act does not apply to the president or vice president. *Id.* § 7322(1). For a full summary of permissible and prohibited political activities under the Hatch Act, see CYNTHIA BROWN & JACK MASKELL, CONG. RSCH. SERV., R44469, HATCH ACT RESTRICTIONS ON FEDERAL EMPLOYEES' POLITICAL ACTIVITIES IN THE DIGITAL AGE 11–12 (2016).

223. This absurdity is depicted humorously in an episode of the television show *Parks and Recreation*. In the episode, the main character, Leslie Knope, who is deputy director of her city's parks and recreation department, is also running for the position of city councilwoman. While in her office at City Hall, she is approached by her campaign manager to approve a design for a new campaign poster. After calling her manager a "beautiful rule-breaking moth," Knope proceeds to walk through City Hall to an exterior door, takes one step outside, looks at the poster and says, "Yes," before returning immediately to work. *Parks and Recreation: Sweet Sixteen* (NBC television broadcast Feb. 23, 2012).

224. Zach Montague, *What Is the Hatch Act? Is Trump Violating It at the R.N.C.?*, N.Y. TIMES (Aug. 26, 2020), https://nyti.ms/3lkPYIx [https://perma.cc/S45L-LQZ9].

225. *See, e.g.*, Alexander Burns & Gardiner Harris, *Big Names Campaigning for Hillary Clinton Underscore Donald Trump's Isolation*, N.Y. TIMES (Nov. 4, 2016), https://nyti.ms/2emgHRf [https://perma.cc/QB8L-PP8U] (noting that President Obama, Vice President Joe Biden, and Senator Bernie Sanders campaigned for Hillary Clinton in the 2016 presidential election).

electorate must pick.[226] Because the electorate is limited to choosing only from the candidates who run, the candidates are the exclusive choices for public office and they ought to "take[] on those attributes of government which draw the Constitution's safeguards into play."[227] From a policy perspective, individuals who are campaigning to earn a position as a state actor should have to demonstrate their willingness and ability to abide by the constitutional restraints that would be imposed upon them if they were to win the election. It seems illogical that one could disregard the Constitution in pursuit of a position whose oath is to defend it.

B. Implications of State Actor Classification on Political Candidates

Though this Note focuses specifically on the threshold requirement of state action, this would be fruitless if the classification of political candidates as state actors lacked tangible implications. Without attempting to describe the full set of scenarios in which political candidates could be liable for constitutional violations if they were to be classified as state actors, one could hypothesize that the majority of these violations would occur in the context of equal protection and First Amendment rights.

First, the Court is more apt to find state action when equal protection with regard to race is at stake.[228] With tactics such as racial priming[229] seemingly on the rise in political campaigns,[230] various

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226. Terry v. Adams, 345 U.S. 461, 481 (1953) (Clark, J., concurring in the judgment) (quoting Smith v. Allwright, 321 U.S. 649, 664 (1944)).

227. *Id.* at 484.

228. *See supra* Part III.A (discussing the white primary cases).

229. *See* Michael Tesler, *Racial Priming with Implicit and Explicit Messages*, OXFORD RSCH. ENCYC. 3 (May 2017), https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-49?print=pdf [https://perma.cc/42DE-ALCX] ("Racial priming is typically defined as the increased impact of racial attitudes on evaluations of relevant political candidates or policies."). *See generally* Nicholas A. Valentino, Vincent L. Hutchings & Ismail K. White, *Cues that Matter: How Political Ads Prime Racial Attitudes During Campaigns*, 96 AM. POL. SCI. REV. 75 (2002) (providing an overview of racial priming in political campaigns).

230. *See, e.g.*, Zack Budryk, *Castro: Trump 'Thinks He's Going to Win in 2020' Through 'Racial Priming*,' HILL (July 28, 2019, 11:36 AM), https://thehill.com/homenews/sunday-talk-shows/455060-castro-trump-thinks-hes-going-to-win-in-2020-through-racial [https://perma.cc/93V7-RE6R] (noting that a Democratic presidential candidate had described Trump's "attacks" on a Black congressman as being "part of a broader 'racial priming' strategy to shore up the president's re-election support"); Sarah McCammon, *From Debate Stage, Trump Declines To Denounce White Supremacy*, NPR (Sept. 30, 2020, 12:37 AM), https://www.npr.org/2020/09/30/918483794/from-debate-stage-trump-declines-to-denounce-white-supremacy [https://perma.cc/

constitutional tort claims could imaginably be brought against political candidates and their campaigns for violations of equal protection.

Second, given the nature of elections and campaigning, violations of the right to free speech may also make courts more open to a finding of state action. This would align with the Court's own comments on the First Amendment's importance to the maintenance of democracy—namely, that the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office."[231] For instance, if political candidates were state actors, then protestors removed from campaign rallies could seek redress for the violation of their First Amendment rights.[232] Additionally, beyond the protestor examples, political candidates could also be liable for the online censorship of political speech through social media. For example, the Second Circuit recently upheld a decision holding that Trump engaged in "'unconstitutional viewpoint discrimination' . . . when he blocked certain Twitter users."[233] If a political candidate engaged in similar behavior, a court may find her liable as a state actor using the framework this Note proposes.

3TFC-N8JQ] ("President Trump's hesitation, once again, to denounce white supremacy during Tuesday's presidential debate is drawing quick condemnation from anti-racism activists . . . .").

231. Buckley v. Valeo, 424 U.S. 1, 15 (1976) (per curiam) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)); *see also* Citizens United v. FEC, 558 U.S. 310, 339 (2010) ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.").

232. This Note does not discuss the complexities of First Amendment free speech and protest doctrine. However, to address the likely counterargument that political candidates must retain the right to control their message in order to effectively campaign, one must acknowledge that not all removal of protestors from campaign rallies would be a constitutional violation. For instance, at a Hillary Clinton rally in Atlanta, Georgia, in 2015, protestors from the Black Lives Matter movement were removed from the rally after loudly chanting and waving signs for almost thirty minutes despite repeated requests to quiet down. Dan Merica, *Hillary Clinton Protested by Black Lives Matter*, CNN (Oct. 31, 2015, 10:20 PM), https://www.cnn.com/2015/10/30/politics/hillary-clinton-black-lives-matter [https://perma.cc/K2RX-GVXM]. In situations such as this, state law provides for criminal penalties for the unlawful disturbance of assemblies and disturbance of the peace if certain levels of interruption are reached. Eugene Volokh, *Is It a Crime To Heckle at a Campaign Rally?*, WASH. POST: VOLOKH CONSPIRACY (Mar. 14, 2016, 5:34 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/03/14/is-it-a-crime-to-heckle-at-a-campaign-rally [https://perma.cc/U42U-U7AX]. Thus, candidates still retain the ability to communicate their message, and peaceful protestors retain their right to free speech.

233. Vanessa Romo, *U.S. Appeals Court Rules Trump Violated 1st Amendment by Blocking Twitter Followers*, NPR (July 9, 2019, 3:38 PM) (quoting Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 236 (2d Cir. 2019)), https://www.npr.org/2019/07/09/739906562/u-s-appeals-court-rules-trump-violated-first-amendment-by-blocking-twitter-follo [https://perma.cc/65AS-LQQQ].

Along the same rationale, infringements of the freedom of the press by political candidates may also warrant a finding of state action. For instance, on December 2, 2019, the Trump reelection campaign announced that it would "no longer credential Bloomberg News reporters to cover its events," accusing the news organization of bias in its coverage of the campaign.[234] This example illustrates the fourth factor discussed in the previous section—the otherwise illogical distinction between incumbent candidates acting in their personal versus official capacity. If Trump were to refuse access to a news organization in his capacity as a state actor, it would clearly trigger constitutional concerns.[235] This supports a conclusion that the same activity done in his capacity as a candidate should also be subject to constitutional scrutiny.[236]

CONCLUSION

As modern politics become increasingly candidate centric and individual campaigns play a more integral part in the election process, the natural next step is to extend the logic of the white primary cases to candidates and campaigns to find that political actors are sometimes state actors. As courts navigate this uncharted territory, the Court's many formulations of the state action doctrine can be synthesized into a new framework for this context, which would include consideration of factors like regulation, funding, benefits, and incumbency status. Though political candidates are not categorically state actors, those

234. Alex Wayne, *Trump Campaign Says It Will Shut Out Bloomberg News from Events*, BLOOMBERG (Dec. 2, 2019, 6:31 PM), https://www.bloomberg.com/news/articles/2019-12-02/trump-campaign-says-it-will-shut-out-bloomberg-news-from-events [https://perma.cc/FYT6-7VVT].

235. *See, e.g.*, Paul Farhi, *Judge Hands CNN a Victory in Its Bid To Restore Jim Acosta's White House Press Pass*, WASH. POST (Nov. 16, 2018, 4:37 PM), https://www.washingtonpost.com/lifestyle/style/judge-hands-cnn-victory-in-its-bid-to-restore-jim-acostas-white-house-press-pass/2018/11/16/8bedd08a-e920-11e8-a939-9469f1166f9d_story.html [https://perma.cc/9KC8-XFPC] (reporting that after the Trump administration revoked the White House press pass of a CNN reporter, a federal judge ordered the White House to temporarily restore the credentials, citing primarily Fifth Amendment due process concerns, though not ruling out possible First Amendment implications as well).

236. Note that if it was instead a challenger refusing access to a news organization, it may be trickier to find state action using the proposed framework, though certainly not impossible. Factual analysis of factors such as regulation, funding, and other benefits would still be required. Additionally, for a challenger candidate, it may still be worth considering whether there is much overlap between campaign officials and other state officials. Finally, a plaintiff could always put forth a policy argument stemming from the white primary cases—that a candidate who is one of the exclusive choices for public office and an essential part of the election machinery should be expected to comply with the Constitution that she hopes to one day defend.

campaigning for positions of power ought to demonstrate that they are prepared to comply with the constitutional constraints that will be imposed upon them if they win. In a world where the line between private and public is often blurry, and political actors seem to dance on that line, a new framework is necessary to think about when the actions of political candidates and their campaigns may be fairly attributable to the state.